

regulatory provisions. Where circumstances permit, a Space Act agreement is available as an alternative instrument which can be more flexible in the area of invention and patent rights.

(h) *Data rights.* Data rights provisions can and should be tailored to best achieve the needs and objectives of the respective parties concerned.

(1) The data rights clause at § 1274.905 assumes a substantially equal cost sharing relationship where collaborative research, experimental, developmental, engineering, demonstration, or design activities are to be carried out, such that it is likely that “proprietary” information will be developed and/or exchanged under the agreement. If cost sharing is unequal or no extensive research, experimental, developmental, engineering, demonstration, or design activities are likely, a different set of clauses may be appropriate.

(2) The primary question that must be answered when developing data clauses is what does each party need or intend to do with the data developed under the agreement. Accordingly, the data rights clauses may be tailored to fit the circumstances. Where conflicting goals of the parties result in incompatible data provisions, grant officers for the Government must recognize that private companies entering into cooperative agreements bring resources to that relationship and must be allowed to reap an appropriate benefit for the expenditure of those resources. However, since serving a public purpose is a major objective of a cooperative agreement, care must be exercised to ensure the recipient is not established as a long term sole source supplier of an item or service and is not in a position to take unfair advantage of the results of the cooperative agreement. Therefore, a reasonable time period (depending on the technology, two to five years after production of the data) may be established after which the data first produced by the recipient in the performance of the agreement will be made public.

(3) Data can be generated from different sources and can have various restrictions placed on its dissemination. Recipient data furnished to NASA can exist prior to, or be produced outside of, the agreement or be produced under

the agreement. NASA can also produce data in carrying out its responsibilities under the agreement. Each of these areas need to be covered.

(4) For data, including software, first produced by the recipient under the agreement, the recipient may assert copyright. Data exchanged with a notice showing that the data is protected by copyright must include appropriate licenses in order for NASA to use the data as needed.

(5) Recognizing that the dissemination of the results of NASA’s activities is a primary objective of a cooperative agreement, the parties should specifically delineate what results will be published and under what conditions. This should be set forth in the clause of the cooperative agreement entitled “Publication and Reports.” Any such agreement on the publication of results should be stated to take precedence over any other clause in the cooperative agreement.

(6) In accordance with section 303(b) of the Space Act, any data first produced by NASA under the agreement which embodies trade secrets or financial information that would be privileged or confidential if it had been obtained from a private participant, will be marked with an appropriate legend and maintained in confidence for an agreed to period of up to five years (the maximum allowed by law). This does not apply to data other than that for which there has been agreement regarding publication or distribution. The period of time during which data first produced by NASA is maintained in confidence should be consistent with the period of time determined in accordance with paragraph (h)(2) of this section, before which data first produced by the recipient will be made public. Also, NASA itself may use the marked data (under suitable protective conditions) for agreed-to purposes.

§ 1274.204 Evaluation and selection.

(a) *Evaluation factor.* A single technical evaluation factor is typically used for CANs. That evaluation factor should be one of the following: Providing research and development or technology transfer, enhancing U.S.

competitiveness, or developing a capability among U.S. firms. Award to foreign firms is not precluded if the evaluation factor is satisfied. Subfactors could include such things as fostering U.S. leadership, potential to advance technologies anticipated to enhance U.S. competitiveness, timeliness of proposed accomplishments, private sector commitment to commercialization, identification of specific potential commercial markets, appropriateness of business risk, potential for broad impact on the U.S. technology and knowledge base, level of commitment (contribution of private resources to the project), appropriateness of team member participation and relationships, (this subfactor should include consideration of the participation of an appropriate mix of small business, small disadvantaged business, and women-owned small business concerns, as well as non-profits and educational institutions, including historically black colleges and universities and minority institutions) appropriateness of management planning, relevant experience, qualifications and depth of management and technical staff, quality and appropriateness of resources committed to the project, performance benchmarks, technical approach, business approach/resource sharing, past performance, the articles of collaboration, etc.

(b) *Technical evaluation.* (1) Competitive technical proposal information shall be protected in accordance with 48 CFR (FAR) 15.207, Handling Proposals and Information. Unsolicited proposals shall be protected in accordance with 48 CFR (FAR) 15.608, Prohibitions, and 48 CFR (FAR) 15.609, Limited Use of Data.

(i) Selecting officials and grant/contracting officers are responsible for protecting sensitive information on the award of a grant or cooperative agreement and for determining who is authorized to receive such information. Sensitive information includes: information contained in proposals; information prepared for NASA's evaluation of proposals; the rankings of proposals for an award; reports and evaluations of source selection panels, boards, or advisory councils; and other information deemed sensitive by the selecting

official or by the grant/contracting officer.

(ii) No sensitive information shall be disclosed unless the selecting official or the grant/contracting officer has approved disclosure based upon an unequivocal "need-to-know" and the individual receiving the information has signed a Non-Disclosure Certificate (Exhibit E to subpart A of 14 CFR part 1260). All attendees at formal source selection presentations and briefings shall be required to sign an Attendance Roster. The attendance rosters and certificates shall be maintained in official files for a minimum of six months after award.

(iii) The improper disclosure of sensitive information could result in criminal prosecution or an adverse action.

(2) The technical officer will evaluate proposals in accordance with the criteria in the CAN. Proposals selected for award will be supported by documentation as described in paragraph (c)(1) of this section. When evaluation results in a proposal not being selected, the proposer will be notified in accordance with the CAN.

(3) The technical evaluation of proposals may include peer reviews. Since the business sense of a cooperative agreement proposal is critical to its success, NASA should reserve the right to utilize appropriate outside evaluators to assist in the evaluation of such proposal elements as the business base projections, the market for proposed products, and/or the impact of anticipated product price reductions. The use of outside evaluators shall be approved in accordance with 48 CFR (NFS) 1815.207-70(b). A cover sheet with the following legend shall be affixed to data provided to outside evaluators:

GOVERNMENT NOTICE FOR HANDLING
PROPOSALS

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with.

(4) Evaluation of unsolicited proposals must consider whether: the subject of the proposal is available to

NASA from another source without restriction; the proposal closely resembles a pending competitive acquisition; and the research proposed demonstrates an innovative and unique method, approach, or concept. Organizations submitting unaccepted proposals will be notified in writing.

(c) *Documentation requirements.* For proposals selected for award, the technical officer will prepare and furnish to the grant officer the following documentation:

(1) For a competitively selected proposal, a signed selection statement and technical evaluation based on the evaluation criteria stated in the solicitation.

(2) For an unsolicited proposal, a justification for acceptance of an unsolicited proposal (JAUP) prepared by the cognizant technical office. The JAUP shall be submitted for the approval of the grant officer after review and concurrence at a level above the technical officer. The evaluator shall consider the following factors, in addition to any others appropriate for the particular proposal:

(i) Unique and innovative methods, approaches or concepts demonstrated by the proposal.

(ii) Overall scientific or technical merits of the proposal.

(iii) The offeror's capabilities, related experience, facilities, techniques, or unique combinations of these which are integral factors for achieving the proposal objectives.

(iv) The qualifications, capabilities, and experience of the proposed key personnel who are critical in achieving the proposal objectives.

(v) Current, open solicitations under which the unsolicited proposal could be evaluated.

(d) *Cost evaluation.* (1) The grant officer and technical team will determine whether the overall proposed cost of the project is reasonable and that the recipient's contribution is valid, verifiable, and available. Commitments should be obtained and verified to the extent practical from the offeror or members of the consortia that the proposed contributions can and will be made as specified in the proposal or statement of work.

(i) If the recipient's verified share on a cooperative agreement equals or exceeds 50 percent of the total cost of the agreement and the total value of the agreement is less than \$5 million, the cost evaluation of the offeror's proposal should focus on the overall reasonableness and timing of the proposer's contribution. Cost or pricing data should not be required and information other than cost or pricing data (defined in 48 CFR (FAR) 15.403–3) should not normally be required.

(ii) If the recipient's share is projected to be less than 50 percent or the total value of the agreement is more than \$5 million, a more in-depth analysis of the proposed costs should be undertaken. Only information other than cost or pricing data should be required. An analysis consistent with 48 CFR (FAR) 15.404–1 through 15.404–2 should be performed.

(2) As part of the evaluation of the cost proposal, the source of the recipient's contribution should be determined. Each of the cost elements contributed by the recipient and their amounts should be identified. If the contribution will consist at least in part of IR&D, the extent to which the IR&D may be recoverable from Government awards should be established. This will involve using the estimated Government participation rate of the recipient's General and Administrative indirect cost base for the period of the cooperative agreement. An analysis consistent with 48 CFR (FAR) 15.404–1 and 15.404–2 should be performed.

(e) *Consortium.* If the cooperative agreement is to be awarded to a consortium, a completed, formally executed Articles of Collaboration is required prior to award.

(f) *Printing, binding, and duplicating.* Proposals for effort which involve printing, binding, and duplicating in excess of 25,000 pages are subject to the regulations of the Congressional Joint Committee on Printing. The technical office will refer such proposals to the Installation Central Printing Management Officer (ICPMO) to ensure compliance with NPD 1490.1. The grant officer will be advised in writing of the results of the ICPMO review.